

Supreme Court, U. S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1735

ANTHONY THOMAS,

Petitioner

v.

THE STATE OF NORTH CAROLINA,

Respondent.

**RESPONSE TO PETITION FOR A
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA**

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STATEMENT OF THE CASE

QUESTIONS PRESENTED

Petitioner's Statement of the Case and phrasing of the Questions is accurate and the State has nothing further to add.

STATUTES AND RULES INVOLVED

In addition to those cited by Petitioner the following statutes and rules are pertinent to this Response:

North Carolina Rules of Appellate Procedure

Rule 28(g) **Additional Authorities.**

Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties prior to the oral argument. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Rule 31(f) **Waiver by Appeal from Court of Appeals.**

The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

REASONS FOR DENYING THE WRIT

- I. DENIAL BY THE STATE OF NORTH CAROLINA TO A CRIMINAL DEFENDANT OF THE OPPORTUNITY TO APPEAR FOR ORAL ARGUMENT AND TO PETITION FOR REHEARING DOES NOT ABRIDGE SAID DEFENDANT'S RIGHTS TO DUE PROCESS, GIVEN THE MULTIPLE AVENUES OF RELIEF AVAILABLE TO A CRIMINAL APPELLANT.

Petitioner correctly notes that the due process clauses of the Fifth and Fourteenth Amendments do not establish an absolute right of appeal. *U.S. v. MacCollum*, 426 U.S. 317, 48 L. Ed 2d 666, 96 S. Ct. 2086 (1976). The constitutional standard whereby a state's appellate process is measured is set forth in *Ross v. Moffitt*, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974): "...once the appellate process is made available, a State must provide a defendant an *adequate opportunity to present his claims fairly* in the context of the State appellate process." (Emphasis added). Respondent earnestly submits that the procedures embodied in the North Carolina General Statutes and Rules of Appellate Procedure provide this Petitioner and all other criminal defendants ample opportunity for a fair hearing.

The provisions of Rules 30(f), 31(a) and 28(h), North Carolina Rules of Appellate Procedure (hereinafter the Rules), all represent efforts to deal with the crowded criminal appellate dockets in North Carolina. This State grants an absolute right of appeal to any person who has entered a plea of not guilty to a criminal charge and has subsequently been found guilty (N.C.G.S. 15A-1444(a)). Additionally, a convicted person who has entered a plea of guilty or no contest may petition the appellate division for review by writ of certiorari (N.C.G.S. 15A-1444). The resultant crush of appellate cases required adoption of measures such as the challenged rules to alleviate the load and provide for some efficient use of judicial resources. The Rules are based on sound reasoning and insure ample

opportunity for a full and fair hearing to any appellant. An analysis of the effect of each rule in question buttresses the State's contention that no denial of due process results from the appellate scheme.

Rule 30(f) of the North Carolina Rules grants to the North Carolina Court of Appeals the prerogative of determining that oral argument will not be of assistance to the court and thereby disposing of the case on the record and briefs and dispensing with unnecessary oral arguments. Inasmuch as parties may not discuss in oral argument any authorities not cited either in the briefs or in a memorandum of additional authorities filed prior to argument [Rule 28(g), *infra*], the effect of denying an appellant the opportunity to present oral argument is abated substantially. Thus, Petitioner here could not at any rate have discussed authorities and arguments outside the brief had he been permitted to argue.

Rule 31(g) excepts criminal actions from its provisions for rehearing in the appellate courts, and thus limits that recourse to civil actions in instances where the court has "overlooked or misapprehended" the Petitioner's argument. Petitioner should not be heard to complain that this rule operated to deny him due process for a variety of reasons. The option of petitioning for rehearing is, even in the civil matters to which it is available, exclusive of the options of petitioning for discretionary review or of appealing to the North Carolina Supreme Court. A civil appellant/petitioner must opt for either a rehearing in the Court of Appeals or for discretionary review or appeal to the Supreme Court as per Rule 31(f), and a request for

either of the latter, more thorough types of review constitutes an abandonment of the petition for rehearing. Petitioner here had the option and in fact did petition for discretionary review pursuant to G.S. 7A-31 and Rule 15; thus, even had he been party to a civil matter, he would have abandoned his opportunity to petition for a rehearing. Had the North Carolina Supreme Court determined, based on the same arguments Petitioner presents herein, that the subject matter of his petition had significant public interest, or that the cause involved legal principles of major significance to the jurisprudence of the State, or that the decision of the Court of Appeals appeared to be in conflict with a decision of the higher court, then the Petition for Discretionary Review would have been granted. Petitioner also had available the option of appealing to the North Carolina Supreme Court from the decision of the Court of Appeals pursuant to G.S. 7A-30 and Rule 14 based on his evident belief that the matter involved a substantial question arising under the Constitution of the United States or of this State. It is likely that this avenue of review was the more appropriate one for Petitioner given his constitutional claims: that it was available illustrates the ample nature of appellate review provided by North Carolina, and that he did not avail himself of it represents yet another valid reason why he should not be heard to press his constitutional claim here. Also included in the panoply of post conviction remedies made available to a criminal defendant are motions for appropriate relief under G.S. 15A-1411 *et seq.* (a kind of post conviction proceeding) and writs of habeas corpus.

Finally, it is submitted that Rule 28(g), captioned "Additional Authorities", would have allowed Petitioner to have remedied his failure to discover the *Taylor* and *Wilcox* cases by filing a memorandum of additional authorities with the Clerk of the Court of Appeals prior to decision by that Court.

It is clear that North Carolina provides an array of appellate recourses to a criminal appellant which are designed to insure a variety of opportunities for presentation of his claims, and the State respectfully submits that certiorari need not issue to review this appellate scheme.

II. RULE 31 OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE MAKES A VALID DISTINCTION BETWEEN CIVIL AND CRIMINAL CASES RELATIVE TO PETITIONS FOR REHEARING AFTER AN APPEAL.

Inasmuch as the bulk of the North Carolina appellate courts' caseload consists of criminal appeals and petitions, to allow petitions for rehearing in such cases would likely result in a flood of such petitions which would clog already crowded dockets. The civil/criminal distinction is justified in that a criminal appellant has infinitely greater recourse than does a civil appellant. (See Argument I, *supra*) Petitioner's contention that Rule 31 draws an impermissible distinction by allowing petitions for rehearing in civil cases but denying them in criminal cases is not supported; the State submits that not only is the distinction a sound and necessary one but also that

ample alternative avenues of review are available to the defendant after determination of his case by the Court of Appeals (i.e., the aforementioned petition for discretionary review, appeal, motion for appropriate relief, writ of habeas corpus). Petition cites *Rinaldi v. Yeager*, 384 U.S. 305, 16 L. Ed. 2d 153, 86 S. Ct. 1497 (1966) for the proposition that avenues of appeal must be kept free of "unreasoned distinctions"; the State contends that the distinction between civil and criminal cases drawn by Rule 31 is amply reasoned and necessary and respectfully submits that no examination of the procedure by this Court is warranted.

III. THE DECISION OF THE COURT BELOW WAS CORRECT IN ALL RESPECTS CONCERNING EXCLUSION OF THE EVIDENCE IN QUESTION.

In the instant case Petitioner's reliance on the import of the excluded evidence is undue and his declaration of the "sole" basis for the exclusion inaccurate. Defendant's brief below cited two reasons for admission of the testimony concerning the date of his arrest: its alleged probative value on the issue of identification and its tendency to "shed light" on the issue by showing that he did not flee after the crime. The State's brief in Argument I rebutted *both* of Defendant-Petitioner's purported rationales for admission of the evidence; thus, there was no misapprehension by the State of his two-prong justification for admission of the disputed evidence. The argument that the evidence was relevant in that it shed light on the certainty of the identification of Defendant by the State's witness is not tenable, inasmuch as the sole State's witness testified

unequivocally regarding his identification of Thomas as his assailant. The State submits that neither error nor prejudice was shown by the exclusion of this evidence, as any delay on the part of the arresting officer could have no effect on the certainty of the prosecuting witness's identification of Defendant, and this was the only testimony presented as to identification. Regarding the excluded testimony as evidence of "non-flight", North Carolina is in accord with the majority American rule in holding that a defendant's failure to take advantage of an opportunity to escape is not admissible in his behalf. See 29 *Am. Jur.* 2d, Evidence, Sec. 287, p. 334. *State v. Taylor*, 61 N.C. 508 (1868); *State v. Wilcox*, 132 N.C. 1120, 44 S.E. 625 (1903). Hence, no error of law can be shown which justifies review by this Court of the proceedings below.

CONCLUSION

WHEREFORE, as Petitioner has cited no federal cases contrary to the applicable rules of law below and has shown no procedural deprivation of due process or infringement of his rights to equal protection, it is respectfully prayed that the Petition for Writ of Certiorari be denied.

This the 27th day of September, 1978

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CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing response to Petition for a Writ of Certiorari to the North Carolina Supreme Court were served this day on Bruce T. Cunningham, Jr., Counsel for Petitioner, by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

Bruce T. Cunningham, Jr.
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This the 27th day of September, 1978.

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